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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1544

JAMES GLENN MOORE,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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IN THE

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OCTOBER TERM, 1980

No._____

JAMES GLENN MOORE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

The petitioner, James Glenn Moore, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Criminal Appeals of Texas rendered in these proceedings on October 31, 1979.

OPINIONS BELOW

On June 16, 1978, in the 66th District Court of Hill County, Texas, a judgment was entered in Cause No. 24,629 styled The State of Texas vs. James Glen Moore. The Court found that the defendant, James Glen Moore, had violated condition A of his terms and conditions of probation and his probation was revoked and the previous sentence of six years which he had received in July, 1973, was imposed.

The revocation order was appealed to the Texas Court of Criminal Appeals. The appellate court affirmed the judgment of the district court. The peti-

tioner thereafter filed a motion for rehearing and a motion for new trial both of which were overruled by the Court of Criminal Appeals. The date the Appellate Court overruled petitioner's motion for rehearing is reflected on the instrument attached hereto as "Exhibit "C". The revocation order of the District Court is attached hereto as "Exhibit "A". The Appellate Court's opinion is attached hereto as "Exhibit "B".

JURISDICTION

The opinion and judgment of the Court of Criminal Appeals of Texas was rendered on October 31, 1979. Petitioner's motion for rehearing was overruled on December 12, 1979.

Petitioner submits that the following statutory provision confers the necessary jurisdiction on the Supreme Court to review the judgment of Court of Criminal Appeals of Texas by writ of certiorari:

Title 28 United States Code, Section 1257 (3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

QUESTIONS PRESENTED

Under the due process clause of the 5th and 14th Amendments to the United States Constitution,

(1) Does a state court have an obligation to be timely in requesting that probation be revoked at a second hearing after being unsuccessful three years earlier when the same probation violation was used as the basis for revocation in both instances?

(2) Does the constitutional right to avoid twice being placed in jeopardy for the same offense extend to a probationer in the circumstances presented by the case at bar, thereby prohibiting a state court from seeking to revoke the petitioner's probation for a second time three years after a negative finding had been entered for the same alleged probation violation?

CONSTITUTIONAL PROVISIONS

United States Code Annotated, Constitution, Article 1, Sec. 1 to Article 1, Sec. 8, Cl. 3, Vol. 1, p. 46, 48.

Amendment V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Amendment XIV:

> "Section 1. . . . No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

In 1973, petitioner was convicted of burglary with intent to commit theft, for which he received a six-year probated sentence. Afterwards, within the probationary period, the State filed its application to revoke probation, and a hearing was held on said motion on April 14, 1975, whereby an order was issued denying the State's motion. Thereafter, a second motion to revoke was filed on February 6, 1978. The basis of this second motion to revoke was the same as the basis of the previous motion to revoke which had been denied on April 14, 1975. The violation of probation alleged in both motions was possession of less than 2 ounces of marijuana on or about December 8, 1974.

Thereafter, on the 2nd day of June, 1978, appellant appeared with his counsel for hearing on the application to revoke. After hearing before the Court, the Court expressly found that appellant had violated condition A of his probationary terms, to-wit: commit no offense against the laws of this or any other state or of the United States. The court then sentenced petitioner to serve his full sentence. From this revocation, due appeal was taken to the Texas Court of Criminal Appeals which affirmed the revocation of petitioner's probation, and which overruled petitioner's motion for rehearing.

Petitioner raised the issues of denial of his constitutional rights to due process of law and protection from double jeopardy in the first instance through the filing of a motion to dismiss (Tr 42-43) prior to the revocation hearing in the State District Court. The motion contains references to the motion to revoke filed in 1975 by the State which was denied, and states that the motion currently pending is based on the same probation violation. Further, the motion states, "the pending motion to revoke should be denied summarily in the interest of justice and due process of law to this Defendant . . ." (TR 43). This motion was taken under advisement by the court at the revocation hearing of June 2, 1978, and was overruled on June 16, 1978.

Petitioner's appellate brief filed in the Court of Criminal Appeals also contains the following grounds of error:

> "The district court abused its discretion in revoking the probation previously granted to appellant Moore since the ground for revocation in the instant case was previously brought before the same court and denied, and after over a three year interval elapsed, a subsequent revocation hearing was held using the original ground for revocation a second time, thereby denying appellant his constitutional right to due process of law." (Appellant's Brief, p. 3)

This ground of error was overruled by the state appellate court, see the opinion of the court, labeled as Exhibit "B", page A-6 - A-7.

ARGUMENT

This Court has previously been presented with and has ruled on the question of whether or not a probationer is entitled to due process of law before his probation may be legally revoked. The Court's holding was in the affirmative. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Nevertheless, a complete extension to the probationer in every instance of all constitutional rights relating to due process was found to be inappropriate. Specifically, the right to counsel in all probation revocation cases was withheld. Consequently, the question remains open as to whether or not other rights which are encompassed under the broad heading of due process of law may be circumscribed as well due to the conditional nature of the probationer's freedom.

In the past, the legal status accorded to a probationer and frequently the rights which accompany such status, have been clouded with ambiguity and uncertainty. A great deal has been clarified through the Court's past decisions, most particularly in the cases of *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The issues presented by the instant case identify further important federal questions, to which answers are sought, for the purpose of attaching greater clarity and certainty to the rights possessed by a probation. In addition, in so doing it would accomplish much needed amplification of the Court's earlier holdings, and would supply the state courts with added guidance on the federal constitutional issues involved.

On July 16, 1973, petitioner entered a plea of guilty to the offense of burglary in the District Court of Hill County, Texas. His punishment was assessed to be six years in prison, however, imposition of the sentence was suspended and petitioner was placed on probation for a period of six years.

Among the terms and conditions of his probation was that he was to commit no offense against the laws of the State of Texas, the United States, or any other state. On March 7, 1975, the State filed a Motion to Revoke petitioner's probation, and a hearing thereon was held on April 14, 1975. At the hearing, evidence was heard and considered by the court, along with the arguments of counsel, and the court rendered a decision denying the state's motion. It is reasonably inferrable from the ruling made by the court that the state had failed to prove by a preponderance of the evidence that a probation violation had been committed by the petitioner, and as a result, the court made a negative finding regarding the allegations that had been presented in the state's motion.

The state's motion alleged that the petitioner had violated a term of his probation, to-wit:

> "The Defendant, James Glenn Moore, committed an offense against the laws of the State of Texas, to-wit: on or about December 8, 1974, did then knowingly possess a usable quantity of marijuana of 2 ounces or less. This offense occurred after July 16, 1973, and during the time of probation."

Prior to the hearing on the state's motion, petitioner was in the custody of the Johnson County Sheriff and

was transferred to Hill County for the hearing.

Immediately following the court's hearing on the state's motion to revoke, petitioner was returned to the Johnson County, Texas authorities for a disposition to be made of the possession of marijuana charge. On the same day as the revocation hearing, April 14, 1975, petitioner entered a plea of guilty to such charge and was sentenced to 180 days in the Johnson County jail, which he served in its entirety.

Following petitioner's release from the Johnson County jail, he sought and obtained a steady job with the Roof-Tex Roofing Company (SF 11, Dec. 28, 1979), married, and took on the further responsibility of supporting one child which was born to his marriage, in addiion to two step-children. (SF 11, Dec. 28, 1979). He was succeeding at all these responsibilities until a new petition for revocation of his probation was filed by the state in October, 1977. (TR 23). He was taken into custody and detained by Hill County law enforcement officials and then subsequently released on bail. No further action was taken pursuant to the motion to revoke filed by the state in October, 1977, and no hearing was held. On February 6, 1978, the state filed an amended motion to revoke probation which deleted the alleged violation which was named in the October motion and replaced it with a different alleged violation which was the same offense involved in the revocation hearing of April 14, 1975, to-wit: (TR 32)

> "James Glenn Moore, on or about the 14th day of April, 1975, plead guilty in the County Court

> of Johnson County, Texas, in cause number 742-M to the misdemeanor offense of possessing a usable quantity of marijuana, to-wit: less than 2 ounces, for which defendant was sentenced to serve 180 days in the county jail of Johnson County, Texas. Said judgment is a final judgment and became final during the term of the said defendant's probation."

A hearing was held on this motion on June 2, 1978, and the motion was granted. On the 16th day of June, 1978, the Court entered an order revoking petitioner's probation and imposing the sentence which had been assessed previously in July of 1973.

There is no reasonable justification for the State to wait almost three full years to initiate a renewed attempt to revoke, when based on the same set of facts involved in the first motion to revoke. As a result, the petitioner was cruelly permitted to rely erroneously on the finality of the first hearing to revoke, in addition to being prosecuted separately on the merits of the case used in two attempts to revoke his probation. It was a completely reasonable assumption on the part of the petitioner to believe that the entire matter had been fully concluded in both courts, and that no further threat was posed by this offense to his continued liberty as a probationer.

Despite the unreasonableness of the state's actions in this regard, and the resulting hardship which was suffered by the petitioner, there are no avenues of prevention or challenge open to a probationer, unless the guarantees of due process of law to be accorded a pro-

bationer, are deemed to include one or more of the following:

(1) protection from being faced with a possible second or subsequent motion to revoke probation which is filed more than one year from the date of the violation alleged and when the first motion to revoke is grounded on the same alleged violation, and is denied;

(2) complete prohibition of the filing of a second or subsequent motion to revoke using the same ground for revocation as an earlier motion which was denied;

(3) in instances where a violation of criminal law is alleged, requiring the State to elect whether to seek revocation of probation before a criminal prosecution is instituted for such offense, or after the adjudication on the merits, but disallowing both options to be available.

The constitutional issues raised by the questions presented herein are far from being clear cut since they are all colored by the context of a probation revocation proceeding, its special qualities, peculiarities, and requisites, and by the respective rights of the State and the probationer in regard to such proceedings. The resolution of these issues on the merits is vital, and would serve to inject much greater definiteness into the interpretation presently given to a probationer's constitutional rights. For all the reasons stated herein, petitioner respectfully prays that his petition for certiorari be granted.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

ROBERT J. WILSON &
ASSOCIATES, INC. and
MICHAEL J. ROGERS
Attorneys at Law
P. O. Drawer 325
Burleson, TX 76028

By: Robert J. Wilson
ROBERT J. WILSON,
Attorney for Petitioner

March 6, 1980

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas was hand delivered to the District Attorney of Hill County, Texas on the 7th day of March, 1980.

Robert J. Wilson
ROBERT J. WILSON,
Attorney for Petitioner

Exhibit A

NO. 24,629

IN THE 66TH JUDICIAL DISTRICT COURT OF HILL COUNTY, TEXAS

THE STATE OF TEXAS

VS.

JAMES GLEN MOORE

REVOCATION OF PROBATION AND IMPOSITION OF SENTENCE

On the 16th day of July, 1973, the defendant was duly and legally convicted for the offense of BURGLARY BY BREAKING in the above entitled and numbered cause and punishment was assessed at six (6) years confinement in the Texas Department of Corrections, and the imposition of the sentence was suspended during the good behavior of the defendant, and the defendant was placed on probation for a period of six (6) years upon the following terms and conditions, to-wit: That during the term of probation the defendant shall:

a. Commit no offense against the laws of this or any other State or of the United States;

b. Avoid injurious or vicious habits; including use of alcohol or narcotics;

c. Avoid persons or places of disreputable or harmful character;

d. Report to the probation officer as directed, at least once each month;

e. Permit the probation officer to visit him at his home or elsewhere;

f. Work faithfully at suitable employment as far as possible;

g. Remain within Hill County, Texas, unless permitted to depart by the Court and/or the probation officer;

h. Pay his fine, if one assessed, and the costs of court, in one or several sums, and make restitution or reparation in any sum that the court shall determine; and

i. Support his dependents.

On the 6th day of February, 1978, the District Attorney of Hill County, Texas, filed with the judge of said court a written report, setting out the respects in which the defendant had violated the conditions of probation, to-wit:

> Committed an offense against the laws of the State of Texas; to-wit: On or about the 14th day of April, 1975, James Glen Moore plead guilty in the County Court of Johnson County, Texas, in cause number 742-M to the misdemeanor offense of possessing a usable quantity of marijuana, to-wit: less than 2 ounces, for which the defendant was sentenced to serve 180 days in the county jail of Johnson County, Texas. Said judgment is a final judgment and became final during the term of the said defendant's probation.

On the 2nd day of June, 1978, the defendant appeared in open Court in person, his attorney, Robert J. Wilson, also being present, and the State appeared

by her District Attorney, and after examining said written report and hearing the evidence offered by both the state and the defendant, the Court is of the opinion that the defendant, JAMES GLEN MOORE, violated the terms and conditions of his probation in this respect:

> Violation of condition A, to-wit: Commit no offense against the laws of this or any other state or of the United States.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the order suspending the imposition of the sentence, and placing the defendant on probation, heretofore entered in this said cause be, and the same is hereby revoked, on this the 16th day of June, 1978, the state appeared by her District Attorney, and the defendant, JAMES GLEN MOORE, appeared in open court in person for the purpose of having sentence pronounced in accordance with the judgment herein rendered and entered against him; and thereupon the said defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in the bar thereof, whereupon the Court proceeded, in the presence of said defendant, to pronounce sentence against him as follows:

It is the ORDER of the Court that the said defendant, who has been adjudged guilty of the offense of BURGLARY BY BREAKING and whose punishment has been assessed by the Court at confinement in the Texas Department of Corrections for a term of

six (6) years, that he be given credit for the 23 days time spent in the Hill County, Texas, jail, be delivered by the Sheriff of Hill County, Texas, to the Director of Corrections of the Texas Department of Corrections, Walker County, Texas, or other persons legally authorized to receive such convicts, and that said defendant shall be confined in said Department of Corrections for an indeterminate term of not less than two (2) years nor more than six (6) years, in accordance with the laws governing the confinement of convicts.

It is further the order of this Court that the sentence commence on the 16th day of June, 1978.

/s/ Steve Latham
Steve Latham, Judge Presiding
66th Judicial District Court
Hill County, Texas

Exhibit B

JAMES GLENN MOORE, Appellant

NO. 60,220 v.

THE STATE OF TEXAS, Appellee

Appeal from HILL County

OPINION

This is an appeal from an order revoking probation. On July 16, 1973, appellant entered a plea of guilty before the trial court to the offense of burglary. Punishment was assessed at six years imprisonment, but imposition of sentence was suspended and appellant was placed on probation.

Among the terms and conditions of his probation was that appellant,

> "[c]ommit no offense against the laws of this State or of any other State or of the United States . . ."

On February 6, 1978, the State filed an amended motion to revoke appellant's probation, in that he,

> ". . . on or about the 14th day of April, 1975, plead guilty in the County Court of Johnson County, Texas, in cause number 742-M to the misdemeanor offense of possessing a usable quantity of marijuana, to wit: less than 2 ounces, for which defendant was sentenced to serve 180 days in the county jail of Johnson County, Texas. Said judgment is a final judgment and became final during the term of the said defendant's probation."

On June 2, 1978, a hearing was held on this motion, after which trial court found that appellant had violated the above condition of his probation and entered an order revoking his probation.

In his first two grounds of error, appellant contends that the trial court abused its discretion in revoking his probation in that the State's amended motion to revoke did not give him adequate notice of the allegations against him or of how he had violated his probation conditions. The record reflects that appellant made no motion to quash the petition to revoke, nor that he ever made any objection thereto. Further, the record reflects that appellant, in open court, advised the trial court that he understood the nature of the revocation hearing and that he fully understood what the State had alleged in the motion to revoke. Since this objection to the adequacy of notice is raised for the first time on appeal, this ground of error is overruled. Fronatt v. State, 543 S.W.2d 140 (Tex.Cr.App. 1976); Wiley v. State, 501 S.W.2d 84 (Tex.Cr.App. 1973); McClure v. State, 496 S.W.2d 588 (Tex.Cr. App. 1973).

These grounds of error are overruled.

In his third ground of error, appellant contends that the trial court abused its discretion in revoking his probation, in that the same ground for revocation was presented to the trial court three years earlier, and the court, at that time, denied the State's motion to revoke. Appellant contends that this revocation of probation, based on the same ground as pre-

sented to the court previously, constituted double jeopardy. This contention has been previously considered by this Court and rejected in *Davenport v. State*, 574 S.W.2d 73 (Tex.Cr.App. 1978). This ground of error is overruled.

In his fourth ground of error, appellant contends that the trial court abused its discretion in revoking his probation in that there was no evidence that the conviction for possession of marjiuana, upon which the State relied for revocation, was a final judgment. A similar contention was presented in Martinez v. State, 531 S.W.2d 343 (Tex.Cr.App. 1976). Therein, we stated,

> "No objection [at trial] was lodged on the ground that the conviction [relied upon for revocation] was not final. This argument appears for the first time on appeal. We reiterate that this method of proving violations of probationary terms is not to be commended. However, we hold that, when it is utilized, such evidence as was before the court in this case is sufficient to show the *commission* of an offense against the laws of this State.
>
> The State would have had the burden of producing the sentence for the . . . conviction *if appellant had timely pressed his complaint in the trial court.*" (Emphasis added)

Since appellant did not raise the issue of the finality of the conviction at the revocation hearing, and since there is nothing in the record to in any way indicate that the conviction is *not* final, this ground of error

is overruled. Martinez v. State, supra; Cannon v. State, 473 S.W.2d 40 (Tex.Cr. App. 1971).

The judgment is affirmed.

COURT OF CRIMINAL APPEALS OF TEXAS

PER CURIAM

(Delivered October 31, 1979)
By: Panel 3; 1st Quarter, 1979
Carl E. F. Dally, Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge

A-9

Exhibit C

COURT OF IMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas DEC 12 1979

Dear Sir:

I have been instructed to advise that the Court has this day denied the Appellant's Motion for Rehearing En Banc in Cause No. 60,220, James Glenn Moore

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

EXHIBIT C

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS OF TEXAS
P. O. Box 12308, Capitol Station
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A-10

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

NO. 79-~~5870~~ 1544

* * *

JAMES GLENN MOORE,

Petitioner

V.

STATE OF TEXAS,

Respondent

* * *

On Petition For Writ Of Certiorari To the Court of Criminal Appeals Of The State of Texas

* * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

NO. 79-1544

* * *

JAMES GLENN MOORE,

Petitioner

V.

STATE OF TEXAS,

Respondent

* * *

On Petition For Writ of Certiorari
To the Court of Criminal Appeals
Of The State of Texas

* * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the Petition for Writ of Certiorari submits its Brief in Opposition:

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals appears as Exhibit B to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257(3). The first issue presented by Petitioner, however, was not raised or addressed by the court below. This Court has no jurisdiction to consider that issue and the remaining issue does not present a substantial federal question.

QUESTIONS PRESENTED

Respondent believes that the only issue properly presented to this Court for review may be stated as follows:

I. Whether the Fifth Amendment right to be free from double jeopardy applies to probation revocation hearings in the circumstances presented to this case?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on Article 1, Sec. 1 to Article 1, Sec. 8, Cl. 3 and the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

On July 16, 1973, Petitioner pled guilty before the state trial court to the offense of burglary. His punishment was assessed at six (6) years imprisonment. The sentence was suspended and Petitioner was placed on probation upon conditions which included that Petitioner, "[c]ommit no offense against the laws of this State or any other State or of the United States . . ." On March 7, 1975, the state filed a motion to revoke Petitioner's probation alleging that he had violated a condition of his probation, in that:

> The Defendant, James Glenn Moore, committed an offense against the laws of the State of Texas, to wit: on or about December 8, 1974, did then knowingly process a usable

> quantity of marijuana of two (2) ounces or less. This offense occurred after July 16, 1973, and during the time of probation.

A hearing was held on this motion on April 14, 1975, and the state's motion for revocation was denied. The record does not reflect the basis for the decision. Later that day, April 14, 1975, Petitioner pled guilty to the possession of marijuana charge.

The state then moved on February 6, 1978, to revoke Petitioner's probation, in that he:

> . . . on or about the 14th day of April, 1975 pleaded guilty in the County Court of Johnson County, Texas, in cause Number 742-M to the misdemeanor offense of possessing a usable quantity of marijuana, to wit: less than 2 ounces, for which defendant was sentenced to serve 180 days in the county jail of Johnson County, Texas. Said judgment is a final judgment and became final during the term of the said defendant's probation.

The trial court, after a hearing on this motion, found Petitioner in violation of the terms of his probation and entered an order revoking it. Petitioner appealed to the Texas Court of Criminal Appeals. His chief contention was that the second revocation proceeding constituted double jeopardy. This contention was overruled by the Court of Criminal Appeals which stated:

> In his third ground of error, appellant contends that the trial court abused its discretion in revoking his probation, in that the same ground for revocation was presented to the trial court three years earlier, and the court, at that time, denied the State's motion to revoke. Appellant contends that this revocation of probation, based on the same ground as presented to the court previously constituted double jeopardy. This contention has been

> previously considered by this Court and rejected in *Davenport v. State*, 574 S.W.2d 73 (Tex.Cr.App. 1078). This ground of error is overruled.

Moore v. State, No. 60,220, slip. op. at 3 (Tex.Cr.App., October 31, 1979); (Petition, A.5).

REASONS FOR DENYING THE WRIT

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE FIRST QUESTION PRESENTED IN THE PETITION.

The first question presented by Petitioner, concerning the notion of timeliness in a second probation revocation, was not raised by Petitioner in the proceedings below, nor passed upon by the Texas Court of Criminal Appeals. Reference to Petitioner's brief in the Texas Court of Criminal Appeals reveals that, although Petitioner included the phrase, ". . . and after over a three year interval elapsed, . . . " in his third error, the third error was directed entirely to his double jeopardy claim as now reflected in his second question presented. In the "Argument" in his brief in the Texas Court of Criminal Appeals, Petitioner concerned himself only with the double jeopardy issue. The mention of the three year interval served only to emphasize this double jeopardy issue: that the two incidents which Petitioner alleged constituted a double jeopardy violation occurred at two distinct times. Likewise, the opinion of the Texas Court of Criminal Appeals reflects that only the double jeopardy issue was before it and passed upon. At no point in the opinion is the timeliness issue addressed or even alluded to.

It is well established that this "Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. Arizona*,

410 U.S. 351 (1973). This Court has "no jurisdiction unless a federal question was raised *and* decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' " *Cardinale v. Louisiana, supra, citing Crowell v. Randell*, 10 Pet. 368, 391 (1836). (emphasis supplied).

II.

PETITIONER'S APPLICATION FOR CERTIORARI DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BUT SIMPLY A QUESTION OF FACT.

No jurisdiction exists in this Court to hear this case because no federal question is raised. "This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case." *Dept. of Mental Hygiene v. Kirchmer*, 380 U.S. 194, 197 (1965). The basic fault in Petitioner's jurisdictional claim lies in the related factors that the record is ambiguous as to the basis for the trial court's initial decision not to revoke Petitioner's probation and that the question is truly one of fact, apparently resolved by the state courts against Petitioner. Petitioner rests his double jeopardy claim on a number of factual "inferences."

> [I]t is reasonably inferrable from the ruling made by the court that the state had failed to prove by a preponderance of the evidence that a probation violation had been committed by the petitioner, and as a result, the court made a negative finding regarding the allegations that had been presented in the state's motion.[1]

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[1]The reasonableness of the inferences drawn by Petitioner is greatly undercut by his failure to recognize that "The revocation decision has two analytically distinct components." *Gagnon v. Scarpelli, supra*, at 784. The first stage of analysis "involves a wholly

This is simply speculation and surmise. The record fails to support this conjecture. Based on the present state of the record, it is equally reasonable to infer that the state trial court choose to exercise its discretion to await the outcome of the marijuana possession prosecution.[2]

This Court has stated: "It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. *Nor will we review one until the fact that it does not do so appears of record." Herb v. Pitcain*, 324 U.S. 117, 128 (1945) (emphasis supplied). Herein lies the defect in Petitioner's case. The jurisdictional argument relies on two "facts" not reflected in the record: that the trial court made a specific finding in the first revocation hearing that Petitioner had not been guilty of possession of marijuana and that the basis for the court's subsequent decision to revoke his probation was the fact of possession of marijuana rather than for *conviction* of such an offense. The trial court's opinion clearly reflects

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retrospective factual question: whether the [probationer] has in fact acted in violation of one or more conditions of his [probation]." The second stage of analysis focuses on "should the [probationer] be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" *Id.* at 784. Petitioner's "inferences" do not take into account the essentially subjective inquiry which must follow any finding of a violation of the terms of probation: given the fact of a violation, how can the interests of both the probationer and society best be served -- by revocation or by continued probation?

[2]The lack of clarity as to the precise basis for the trial court's initial refusal to revoke Petitioner's probation precludes a decision on whether the double jeopardy clause forbids the second probation revocation proceeding. *See, Illinois v. Vitale*, _____ U.S. _____, 29 CRIM.L.REP. (BNA) 3190 (June 18, 1980). Petitioner should be required to clarify the factual posture of this case through the use of the habeas corpus procedures that remain available to him before this Court undertakes review of his double jeopardy claim. *Cardinale v. Louisiana*, 394 U.S. 437 (1979).

that the revocation was based on Petitioner's conviction. (*See* Exhibit A of the Petition for Writ of Certiorari).

What is presented, then, "is primarily a factual issue which does not, by itself, justify the exercise of [this Court's] certiorari jurisdiction . . ." *Tacon v. Arizona*, *supra*, 410 U.S. at 352. It is well established that this Court is "[a] court of law . . . rather than a court for a correction of errors in fact finding . . ." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

III.

DOUBLE JEOPARDY PROTECTION IS NOT APPLICABLE TO PROBATION REVOCATION PROCEEDINGS.

The right to be free from double jeopardy adheres only to criminal prosecutions which clearly excludes probation revocations. As this Court has stated, "[p]robation revocation, like parole revocation,is not a stage of a criminal prosecution . . ." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). This Court has held that the risk to which the double jeopardy clause refers is not present in proceedings that are not essentially criminal. As stated in *Breed v. Jones*, 421 U.S. 519, 528 (1975): "In the constitutional sense, double jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed* went on to extend the right of double jeopardy protection to juvenile delinquency actions. This Court noted the practical similarity between juvenile proceedings and regular criminal prosecutions. "We believe it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." *Id.* at 529.

This Court has consistently made clear, however, that a like relationship does not exist with probation

revocation. In finding that no difference in due process rights existed between parole and probation revocation, the Court observed that:

> Parole arises after the end of the criminal prosecution, including imposition of sentence ... Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

Gagnon v. Scarpelli, supra at 781, citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). The Court stressed "... there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." *Gagnon v. Scarpelli, supra*, 411 U.S. at 788-789. This Court, noting that while juvenile delinquency proceedings had been held functionally akin to criminal trials, stated that, "[a] juvenile charged with violation of a generally applicable statute is differently situated from an already convicted probationer or parolee, and is entitled to a higher degree of protection." *Id.* at 789 n. 12.

Similar facts to the present case were confronted in *Dunn v. California Dept. of Corrections*, 401 F.2d 340 (9th Cir. 1968) where the Ninth Circuit held that "[d]ouble jeopardy is not applicable to parole revocation proceedings." *Id.* at 342. The Ninth Circuit in *Dunn* held that although the California Adult Authority may have once determined not to revoke parole for certain drug use it could later consider the same grounds for revocation.

It is clear from *Morrissey* and *Gagnon* that having been tried, convicted, and sentenced, the probationer is in a different position from an individual facing deprivation of his absolute liberty. The imposition of the punishment already assessed to a probationer does not implicate the protection of the double jeopardy clause

for "the Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction not punishment." *Price v. Georgia*, 398 U.S. 323, 329 (1970); *Breed v. Jones*, 421 U.S. 519, 532 (1975).

CONCLUSION

For the reasons stated above, Petitioner has failed to present facts indicating that a review of his contentions is needed and, therefore, the Petition of Writ of Certiorari should be denied.

Respectfully submitted,

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